U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 December 2007

In the Matter of
LARRY BARNUM
Complainant

v. Case Number 2008 STA 00006

J.D.C. LOGISTICS, INC
Respondent

RECOMMENDED ORDER

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (the "Act" or "STAA"), 49 U.S.C § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination because the employee has engaged in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint. A hearing was held pursuant to the Surface Transportation Act on November 13, 2007 at the United States District Court, Grand Rapids, Michigan. Respondent failed to appear.

29 C.F.R. § 18.1 sets forth that the Rules of Civil Procedure of the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation. There is no express authority in the STAA or the applicable regulations explicitly governing default judgments. Thus, the Federal Rules of Civil Procedure apply. Rule 55 of the Federal Rules provides further support, and a procedural framework, for a default judgment. A default decision may be entered against any party who fails to appear without good cause. ***Husen v. Wide Open Trucking, Inc***., ARB Nos. 05-115, 05-130.

Moreover, on November 14, I entered an Order requiring the Respondent to Show Cause why a default judgment should not be entered. A default decision may also be entered for failure of the Respondent to comply with the rules. ***Ass't Sec'y & Marziano v. Kids Bus Service, Inc***., ARB No. 06-068. The Respondent was served by certified mail. [USPS Certification number: 7007 1490 0001 3922 0124]. As of this date, the Respondent has not responded.

At the hearing, the Complainant appeared and testified. In addition to the service of the complaint, and the Notice of Hearing, the Claimant advised me that he tried to confer with Respondent under my Pre-hearing Order and he transmitted his proposed exhibits to Respondent to their office in Franklin, Wisconsin,[1] on October 31. See Transcript (TR) at 6-7. Twenty seven Claimant's exhibits, "CX" 1- CX 27, were entered into evidence.

[1] 9809 South Franklin Street. FAX number 262 364-3035.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

(a) Prohibitions:

(1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;

(B) the employee refuses to operate a vehicle because:

(i) The operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) The employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Prima Facie Case

Inferential claims under the STAA are adjudicated pursuant to the standard articulated in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). Under that framework, the complainant must initially establish a prima facie case of retaliatory discharge, which raises an inference that the protected activity was likely the reason for the adverse action. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 229 (6th Cir. 1987); *see also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981). To establish a prima facie case of retaliatory discharge under the Act, the complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. ***Moon***, *supra*.

Protected Activity

Under 49 U.S.C. § 31105 (a)(1)(A), an employee has engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. A complainant need not objectively prove an actual violation of a vehicle safety regulation to qualify for protection. ***Yellow Freight System, Inc. v. Martin,*** 954. F.2d 353, 356-57 (6th Cir. 1992); *see also* ***Lajoie v. Environmental Management Systems, Inc.***, 1990-STA- 00031 (Sec'y Oct. 27, 1992). A complainant also need not mention a specific commercial motor vehicle safety standard to be protected under the STAA. ***Nix v. Nehi-R.C. Bottling Co.***, 1984-STA-00001, slip op. at 8-9 (Sec'y July 4, 1984). An employee's threats to notify officials of agencies such as the Department of Transportation or the Federal Motor Carrier Safety Administration may also be protected under the STAA. ***William v. Carretta Trucking, Inc., 1994-STA-00007 (Sec'y Feb. 15, 1995)***.

Such complaints may be oral rather than written. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 227-29 (6th Cir. 1987) (finding that driver had engaged in protected activity under the STAA where driver had made only oral complaints to supervisors). If the internal

communications are oral, however, they must be sufficient to give notice that a complaint is being filed. *See* ***Clean Harbors Environmental Services, Inc. v. Herman***, 146 F.3d 12, 22 (1st Cir. 1998) (holding that the complainant's oral complaints were adequate where they made the respondent aware that the complainant was concerned about maintaining regulatory compliance).

Under the STAA, an employee can also engage in protected activity by refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health" or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. §§ 31105(a)(1)(B)(i)-(ii). These two types of refusal to drive are commonly known as the "actual violation" and "reasonable apprehension" subsections. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, slip op. at 6 (Sept. 30, 2005) (*citing* ***Leach v. Basin Western, Inc.***, ARB No. 02-089, slip op. at 3 (July 31, 2003)). Since the Complainant has made no allegation that he ever refused to operate a vehicle, however, these two provisions are inapplicable in this case.

Adverse Employment Action

The employee protection provisions of the Surface Transportation Assistance Act provide that "[a] person may not discharge an employee" for engaging in protected activity under the Act. 49 U.S.C. § 31105(a). The Complainant has not been returned to status and I accept that he suffered adverse employment action within the meaning of the Act in this case.

Causal Connection

A causal connection between the protected activity and the adverse employment action may be circumstantially established by showing that the employer was aware of the protected activity and that adverse action followed closely thereafter. *See* ***Couty v. Dole***, 886 F.2d 147, 148 (8th Cir. 1989). Thus, close proximity in time can be considered evidence of causation. ***White v. The Osage Tribal Council***, ARB No. 99- 120, slip op. at 4 (Aug. 8, 1997). While temporal proximity may be used to establish the causal inference, it is not necessarily dispositive. ***Barber v. Planet Airways, Inc.***, ARB No. 04-056, slip op. at 6 (Apr. 28, 2006). When other, contradictory evidence is present, inferring a causal relationship solely from temporal proximity may be illogical. ***Id.*** Such contradictory evidence could include evidence of intervening events or of legitimate, nondiscriminatory reasons for the adverse action. ***Id.***

Rebutting the Complainant's Prima Facie Case

If the Complainant can carry his burden of establishing a prima facie case, the burden shifts to the Respondent to rebut that prima facie case. The Respondent can do so by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. The employer "need not persuade the court that it was actually motivated by the proffered reasons," but the evidence must be sufficient to raise a genuine issue of fact as to whether the employer discriminated against the employee. ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 254-255 (1981). "The explanation provided must be legally sufficient to justify a judgment for the [employer]." Id. If the Respondent is successful, the prima facie case is rebutted, and the complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the respondent was a mere pretext for discrimination. ***Id.*** at 255-256.

FINDINGS OF FACT

After a review of the evidence, I find that the Claimant has established a prima facie case: (1) he engaged in protected activity under the STAA as he declined a load due to safety issues; (2) he was the subject of an adverse employment action in that he was not given further work; and (3) there was a causal link between his protected activity and the adverse action of the employer. I find that the Claimant is credible and not only do I accept his rendition, the facts show a temporal relationship. ***Moon***, *supra*.

The Claimant was a driver for Respondent on January 18, 2007 when he was asked to drive from the southern part of Milwaukee, Wisconsin to Jackson, Michigan. Besides being a driver, he is also a member of Highway Watch patrol. TR 41, CX 27. He declined the trip. When asked why he could not follow his dispatch order, the Claimant maintained:

> From 5 a.m. to 10 o'clock p.m. is 17 hours. My logbook and every regulation states that I can only be on service for 14 hours. There is no possible way that I can put 17 hours into a 14-hour shift. Fourteen hours will support 17 hours. But 17 hours by itself will not handle 14.
>
> So I told dispatch, this is an illegal order. And when I told them that it was an illegal order, he said back to me, well maybe you can deliver early….
>
> Well, I cannot deliver early. I have 210 miles to New Buffalo. I have 143 miles to Jackson….

TR 17.

Later, he alleged that the route to Jackson was 353 miles. TR at 18.

He was dispatched a second trip for January 19 that would have covered 477 miles. TR 22. He maintained that if he had forgone the first trip to take the second, he would still have been "out of hours." Not only would he have had to exceed the 124 hour per trip requirement, he would also have exceeded the "70 hour rule." TR 23.

He also maintains that he complained about the time issue over his Mobile Max, his satellite tracking device. TR 38 -40, 50.

When he told the dispatcher, "Tom," that he was going to take the truck home, he was told that he would be charged a $500 recovery fee. TR 24.

The Complainant alleges that he was ready and willing to work for respondent on January 20, 2008. TR 34, 36. He alleges that he also informed this to the Respondent's maintenance department. Id. 35. He alleges that the Respondent was informed that he was available on the 21st.

Once Complainant has established a prima facie case, the Respondent can rebut by articulating, through the introduction of admissible evidence, a legitimate, nondiscriminatory reason for its employment decision. However, Respondent has defaulted.

RELIEF

Under the STAA, a prevailing complainant is entitled to relief including abatement, reinstatement and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A)(i)(iii).

Complainant seeks reinstatement to his position as a truck driver, award of back wages, and compensatory damages.

REINSTATEMENT

Under STAA section 405(c), the Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. A finding of violation by an ALJ necessarily subsumes a finding of reasonable cause to believe that a violation has occurred. Such preliminary order may issue at any time after the Secretary has investigated a discrimination complaint and before she issues a final order.

I recommend reinstatement.

BACK PAY

The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. ***Albemarle paper Co. v. Moody***, 422 U.S. 405 418-421 (1975) (under Title VII). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e seq. (West 1988). Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. Back pay calculations must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." ***Cook v. Guardian Lubricants, Inc.***, ARB No. 97-05, slip op. at 11 (*citing* ***Beltway v. American Cast Iron Pipe Co., Inc.***, 494 F.2d 211; 260-61 (5th Cir 1974).

Complainant alleges that he made about $3000 in January. TR 29. He did not work after the 18th, the date that he refused the load. A review of CX 10, a pay sheet, actually shows that he made $1649.83 in gross wages for the period. Prorating that amount on a daily basis[2] yields $91.65 per day for the period that the Complainant worked for the Respondent.

Post termination, the Complainant worked for Avery Leasing, Marshall, Michigan and earned approximately $6000 for the period June to September, 2007. TR 27-28.

I find that Complainant is entitled to an award of $91.65 per day for each day that he is not reinstated. He has a duty to mitigate and the Respondent is exonerated for the $6000 in earnings from Avery.

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's termination on December 19, 2006, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made. ***Moyer v. Yellow Freight System, Inc.***, [Moyer I], Case No. 89-STA-7 at 9-10 (Sec'y Sept. 27, 1990), rev'd on other grounds. ***Yellow Freight System, Inc. v. Martin***, 954 F.2d 353 (6th Cir. 1992).

The rate of interest to be applied is that required by 29 C.F.R. § 20.58(a)(2001)[3] which is

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[2] Divided by 18 days of the month of January.

[3] § 20.58 Rate of interest.

(a) The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury as published in the FEDERAL REGISTER (as of the date the notice is sent), unless another rate is specified by statute, regulations or preexisting Contract condition. The Office of the Chief Financial Officer will notify agencies promptly of the current Treasury rate. The responsible agency may assess a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the interests of the United States, and such rate is agreed to by the Chief Financial Officer (or his designee). The rate of interest prescribed in section 6621 of the Internal Revenue Code shall be sought for backwages recovered in litigation by the Department.

the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621 (2001). The interest is to be compounded quarterly. ***Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cote v. Double R Trucking, Inc.***, Case No. 98-STA-34 at 3 (ARB Jan. 12, 2000).

COMPENSATORY DAMAGES

The Complainant alleges that while employed he was entitled to medical and dental insurance for himself and his wife. TR 47. He also was provided life insurance policies for $30,000 for himself and $5000 for his wife. TR 47.

He alleges that the Respondent

> …made stress almost unbearable. The physicians say you should avoid stress at any cost or most cost the best you can. I haven't been able to purchase my medicines that I need. I haven't been able to do a lot of things because of that. My wife was not able to buy her medicines. She needs to be treated as a diabetic now. And I have no car insurance. I have no car. I have no money. I can't do nothing.

TR 33.

After a review of the evidence and after listening and watching the Complainant, I credit his testimony on this point.

The Secretary and the Administrative Review Board hold that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury. *See* ***Leveille v. New York Air National Guard***, 1994-TSC-3 & 4 (ARB Oct. 25, 1999). A vast array of award amounts have been upheld. *See, e.g.*, ***McCuistion v. Tennessee Valley Authority***, 1989-ERA-6 (Sec'y Nov. 13, 1991). For example, in ***DeFord v. Tennessee Valley Authority***, the claimant received $10,000 in damages for chest pains, difficulty with swallowing, indigestion, sleeplessness, and general anxiety and depression ***DeFord v. Tennessee Valley Authority***, 1981-ERA-1 (Sec'y Apr. 30, 1984). However, in ***Muldrew v. Anheuser-Busch, Inc.***, the Court of Appeals held an award of $50,000 was reasonable for emotional distress and mental suffering for the complainant's loss of his house and his car, and marital difficulties that resulted. See ***Muldrew v. Anheuser-Busch, Inc.***, 728 F.2d 989, 992 (8th Cir. 1984). Likewise, in ***Wulf v. City of Wichita***, the court granted an award of not greater than $50,000 to a plaintiff who was angry, scared, frustrated, depressed, under emotional strain, and experienced financial difficulties as a result of losing his job. ***Wulf v. City of Wichita***, 883 F.2d 842, 875 (10th Cir. 1989).

In ***Calhoun v. United Parcel Services,*** 2002-STA-31 (ALJ June 2, 2004), the ALJ awarded compensatory damages for emotional distress. Based on the ALJ's observations of the Complainant at two hearings, the Complainant's treatment by a psychological for emotional distress, and the Employer's lack of challenging the Complainant's emotional distress claims, the ALJ awarded a modest amount of damages for emotional distress. Similarly, in ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ALJ awarded emotional distress damages where the Complainant had put forth evidence demonstrating that he had gained weight from depression and stress, testified that he had trouble sleeping, and that his self-esteem had been damaged.

The Complainant has not provided adequate evidence of substantial emotional distress to justify a significant amount in awarding compensatory damages for mental distress. In comparable cases, a complainant will often offer evidence of adverse effects that psychological trauma has had on his or her life, such as damage to a relationship, an inability to function at

work, or other disruption of the normal routines of life.[4]

Although I find that the Complainant is entitled to compensatory damages for them, I am not able to calculate the amount of loss suffered because of the loss of fringe benefits in this matter. Likewise I do not have adequate information as to the loss of the ability to pay for medication.

Although the Complainant requests reimbursement for a $500.00 recovery fee for the Respondent's truck he took home, I find that he failed to show that he was discriminated in that fee.

After a review of the evidence, I find that $5000 provides adequate compensation for the Complainant's pain and suffering, including the effects of the loss of fringe benefits.

RECOMMENDED ORDER

For the foregoing reasons, I hereby **RECOMMEND** that Complainant, Larry Barnum, be awarded the following remedy:

1. Respondent, J.D.C. Logistics, shall reinstate Complainant with the same seniority, status, and benefits he would have had but for Respondent's unlawful discrimination;
2. Respondent shall remit to Complainant:
   A. Back pay of $91.65 per day for the period of January 19, 2007 (date of discharge) to date, less $6000 in earnings from Avery Leasing.
   B. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. §6621.

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[4] For examples, see:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding $400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding $40,000 for emotional pain and suffering caused by a discriminatory layoff after the Complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- ***Michaud v. BSP Transport, Inc***., ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).
- ***Blackburn v. Metric Constructors, Inc***., Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding $5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).
- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding $10,000 for mental distress caused by discriminatory discharge where the Complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

C. The Secretary shall designate an official to calculate the amounts set forth by A and B above.

3. The Respondent pay to the Complainant $5,000 in compensation for the stress and anxiety that the Complainant suffered as a result of his wrongful discharge;

SO ORDERED

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF REVIEW: The Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is **EFFECTIVE IMMEDIATELY** upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).